BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the matter of: APPLICATION NO. 99-1 SUMAS ENERGY 2 GENERATION FACILITY	NO. 99-01 MOTION FOR RECONSIDERATION OF COUNCIL ORDER NO. 757

COMES NOW Whatcom County pursuant to RCW 34.05.470, and moves the Council to reconsider Council Order No. 757. As more fully presented in the Memorandum of Law in Support of Reconsideration of Order No. 757 attached hereto, Whatcom County respectfully requests that the Council reconsider its decision granting SE2 the opportunity to now file a revised or new application in this matter and to reopen the adjudicative hearings herein on a limited basis to review said application, and its decision to delay transmission of Council Order No. 754 to the Governor.

FURTHERMORE, as supported in the accompanying Memorandum of Law, Whatcom County requests that the Council reject any amendment to the existing application in this matter or the submission of a new or revised application thereto and forthwith transmit Council Order 754 to the Governor in accordance with RCW 80.50.100.

DATED this 30th day of April, 2001.

_____ / S / _____
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I. Although the Council was correct in denying SE2's motion for reconsideration, since the Council issued a final decision and order, neither the laws nor rules governing the Council's procedure allow for the submission of a revised application and additional hearings at this time. Order No. 754 must be submitted to the Governor as entered.

The Council was correct in concluding that SE2 did not present proper grounds for reconsideration of Order No. 754. For the many reasons cited by the Council in Order No. 757, the Council acted correctly in denying the motion. However, the Council erred in granting SE2 leave to withdraw its current application and submit another "revised" or "new" application and reopening the adjudicative hearings on a limited basis to provide an expedited review process for that new application. Under the circumstances that relief is not contemplated or allowed under the governing law and rules of procedure.

WAC 463-42-690 governs the amendment of applications. Under the facts of the present case, the Council's most recent decision is tantamount to allowing SE2 to amend its application. That is a remedy which is not permitted under this rule.

The Council states that the spirit of its governing laws would allow for the relief which it has provided. That is simply not the case. RCW 80.50.010 gives the legislative provision which

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specifies the spirit of the relevant statutory law. It says nothing of providing applicants with second bites of the apple, multiple applications, or expedited review of revised applications in order to meet the needs of applicants or to provide fast review. In fact, the only reference to expedited review of applications in stated in RCW 80.50.100. Those exceptions from the general review process are very limited and, given the history of this matter, are certainly not applicable to the case at hand. There is no authority within the law governing this proceeding which empowers the Council to grant an expedited review of a new or revised application for SE2 as it has done here. Under the facts of this case, the Council is acting without express authority of law.

The Council seems to have misinterpreted the arguments which were made against reconsideration which were predicated upon RCW 80.50.100 (3). The Council seems to read those arguments to mean that the parties opposing the motion were taking the position that the Council could consider the offered modifications, so long as it did so under a renewed adjudicative process. That is not the case. Taken together WAC 463-42-690 and RCW 80.50.100(3) stand for the proposition that once an application is submitted for review by the Council and the Council has concluded its adjudicative hearings and issued a final order, that final order must be submitted to the Governor. Absent extraordinary circumstances (none were found herein) there are to be no further amendments to the applications after the fact and no further hearings are allowed. Given the Council's conclusions relating to SE2's motion for reconsideration, at this juncture, Order 754 must go to the Governor. Should the Governor deny the application, then, and only then, may an applicant submit a subsequent application for the same site. It is after that decision that the Council could receive and process a new or revised application. As stated above, there is nothing in the controlling law or procedure which would allow the Council to accept and consider a revised application at this time. Let the Governor decide. If SE2 wishes to submit a new application thereafter, it may do so then, but not now.

While one might argue that this motion is asking the Council to put form over substance, that argument really begs the question. Those entrusted with decision making power must respect the constraints placed upon them and the process. Those constraints exist to offer protection and due process to the parties involved. Procedural requirements are not adopted haphazardly, they are adopted with those purposes in mind. Turning back to the arguments posed against SE2's motion for reconsideration, one can discern many of those purposes. For example, Council for the Environment pointed out that allowing after the fact amendments prejudice the ability of other parties to thoughtfully approach and tailor their response to an application. Council for the Environment also stressed that granting the relief sought by SE2, and now provided by Council Order 757, would thwart the settlement process embodied in the Council's procedural rules.

The relief granted by the Council does nothing to support the various needs and objectives underlying the doctrine of finality of judgments. As previously stated, there is need for

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finality. Given the inevitable lag times between the receipt of evidence and the ultimate decision, there would be little hope that the administrative process could ever come to a conclusion if merely the offer of new evidence would require reopening the hearing. *See, e.g.*, Vermont Yankee Nuclear Power Corp. v. N.R.D.C., 435 U.S. 519, 555, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978). The only extraordinary circumstances surrounding SE2's request for reconsideration and their offered new application is the fact that they failed to foresee or adequately investigate the site or mitigate the many negative impacts which their project was found to present. Lack of compromise or foresight on the applicant's behalf is not a basis upon which to reopen a hearing, particularly in light the remedy available to SE2 under RCW 80.50.100(3). The Council needs to remember that reopening a hearing is not a preferred course of action, instead it is one reserved for extraordinary circumstances. Cities of Campbell v. F.E.R.C., 770 F.2d 1180, 1191 (CA, D.C., 1985), and the only extraordinary circumstance in the present case is that the applicant is trying now to amendment its application due to its own tactical decisions. SE2 should not be rewarded at the cost of undermining the Council's governing law and rules.

In conclusion, the Council was correct in its perception that SE2's suggested changes would constitute a new or revised application. It was correct in its decision that it did not commit any errors of law in reaching the conclusions it did in Order No. 754. It also acted correctly in denying SE2's motion for reconsideration. However, as there were no extraordinary grounds discovered upon which to reopen this matter, and since the Council's governing law and rules do not provide for the relief granted in Order 757, the Council should withdraw its invitation to SE2 to submit a new or revised application, it should strike its decision granting a limited reopening of the adjudicative process to review that new application in an abbreviated fashion, and it should instead immediately transmit Order No. 754 to the Governor for his review pursuant to RCW 80.50.100.

Respectfully submitted this 30th day of April, 2001.

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